Supreme Court, U.S.
FILED

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No. ———

In The

Supreme Court of the United States

ARCTIC ALASKA FISHERIES CORPORATION,

Petitioner,

v.

DANELLE HODDEVIK,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does federal maritime law preclude the State of Washington from applying its sexual harassment law where the plaintiff is a Jones Act seaman, where the acts of alleged harassment occurred at sea off the coast of Alaska outside the territorial waters of any state and arise within admiralty jurisdiction, where the seaman has an available remedy under both a federal statute and a judicially fashioned admiralty rule, and where application of state law would have a significant adverse effect on uniformity in maritime law?

2. Does federal maritime law preempt application of an individual state's law prohibiting sexual harassment in the workplace when the plaintiff's employment and the alleged acts of harassment occur beyond the territorial waters of that state and beyond that state's jurisdictional reach.

PARTIES

The parties to this action are Arctic Alaska Fisheries Corporation, Petitioner, and Danelle Hoddevik, Respondent.

CORPORATE DISCLOSURE

Tyson Seafood Group, Inc., a successor of Arctic Alaska Fisheries Corporation, was a subsidiary of (and, subsequently, d/b/a Tyson Seafood Group, a division of) Tyson Foods, Inc. Tyson Foods, Inc., sold the assets of its division, Tyson Seafood Group, in July 1999, and Tyson Seafood Group no longer does business.

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OPINIONS BELOW

The opinion of the Washington State Court of Appeals, *Hoddevik v. Arctic Alaska Fisheries Corp.*, is published at 94 Wash. App. 268, 970 P.2d 828 (1999). App. 1-15. The Washington State Supreme Court denied discretionary review of the Court of Appeals' decision in an unpublished order dated September 1, 1999. App. 28.

STATEMENT OF JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1257(a), on Writ of Certiorari from the Order of the Washington State Supreme Court dated September 1, 1999, denying discretionary review of the decision of the Washington State Court of Appeals entered February 1, 1999. This Petition is timely mailed within ninety days of September 1, 1999. Rules of the Supreme Court 13.1 and 29.2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes at issue herein are U.S. CONST. art. III § 2, the Jones Act, 46 U.S.C. § 688, Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and Washington Law Against Discrimination, RCW 49.60.010-030 and .180, which are set forth in full in the Appendix hereto. App. 29-36.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Danelle Hoddevik, Respondent, filed a complaint for damages in the Superior Court of the State of Washington for King County on May 22, 1995. In her complaint, Hoddevik alleged that she had suffered emotional injuries as the result of sexual harassment she suffered while working as a processor and steward aboard the F/V OCEAN ENTERPRISE. The OCEAN ENTERPRISE is a factory trawler fishing vessel owned by Petitioner, Arctic Alaska Fisheries Corporation.

Hoddevik alleged three liability theories against Arctic Alaska: (1) "hostile work environment" sexual harassment in violation of Washington's Law Against Discrimination (WLAD), codified at RCW 49.60, *et seq.* (App. 34-37); (2) negligent supervision under Washington State common law allegedly causing emotional distress; and (3) federal claims of Jones Act negligence (46 U.S.C. § 688) (App. 30) and unseaworthiness under the general maritime law. Hoddevik did not assert a claim under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (App. 30-34) presumably because she did not file the requisite administrative charge. 42 U.S.C. § 2000e-5 (App. 31).

On November 20, 1996, Arctic Alaska moved for partial summary judgment dismissing Hoddevik's state law claims, both statutory and common law, on the grounds that such claims were preempted by federal admiralty law. The trial court granted Arctic Alaska's motion on January 3, 1997, and entered an order dismissing Hoddevik's state law claims with prejudice. App. 19-21. Hoddevik sought

discretionary review of the grant of partial summary judgment in the Washington Court of Appeals (Division I). In a well-reasoned ruling, the Court of Appeals' Commissioner denied discretionary review on April 2, 1997. App. 19-21.

The case proceeded to trial on Hoddevik's maritime theories. On June 9, 1997, the jury returned a mixed verdict which found in Hoddevik's favor on Jones Act negligence, but found against her on the general maritime law doctrine of unseaworthiness, and also found against her on her claims for no-fault maritime benefits of maintenance and cure. Following post-trial motions, Final Judgment was entered on August 15, 1998. On August 22, 1997, Arctic Alaska filed a timely notice of appeal on various grounds, including the jury's finding of Jones Act negligence and the trial court's refusal to instruct the jury that Hoddevik must satisfy the "zone of danger" requirement of federal maritime law for purely emotional injury; Hoddevik cross-appealed the trial court's grant of partial summary judgment preempting her state law claims.

In an opinion dated February 1, 1999, the Court of Appeals reversed the judgment imposing liability for Jones Act negligence, finding that the jury instructions were substantively deficient, and also reversed the trial court's grant of partial summary judgment preempting Hoddevik's state law claims. App. 1. Hoddevik filed a motion for reconsideration in the Washington Court of Appeals, which was denied on March 3, 1999. App. 16. Both parties then sought discretionary review in the Washington Supreme Court. Arctic Alaska sought discretionary review of the Court of Appeals' opinion holding that Hoddevik's state law claims were not preempted by federal maritime law. The Washington Supreme Court

denied both petitions by Order dated August 31, 1999. App. 28.

RELEVANT FACTS

On May 24, 1992, Danelle Hoddevik was hired by Arctic Alaska in Seattle, Washington. She was immediately flown to Dutch Harbor, Alaska, and taken directly to the F/V OCEAN ENTERPRISE. Hoddevik's entire employment with Arctic Alaska was spent aboard the vessel, and the alleged acts of harassment occurred while the vessel was at sea, in United States territorial waters in the Bering Sea. Declaration of Paul McGreenery (App. 38-39).

In 1992, when Hoddevik was aboard the OCEAN ENTERPRISE, the vessel operated as a factory trawler, *i.e.*, it caught fish and processed them at sea in a self-contained factory. *Id.* The vessel fished primarily in the Bering Sea and in the Gulf of Alaska, in United States territorial waters, beyond the jurisdiction of any state. *Id.* When Hoddevik was aboard, the vessel fished only in United States territorial waters in the Bering Sea. *Id.*

The OCEAN ENTERPRISE was one of more than thirty vessels in Petitioner Arctic Alaska Fisheries Corporation's fleet. *Id.* Petitioner's fleet consisted of several different types of vessels, including factory trawlers, longliners, a pure factory vessel, catcher vessels, crab vessels and freighters. *Id.* These vessels plied the North Pacific Basin and Bering Sea, in United States waters, Canadian waters, international waters and Russian waters in the western Bering Sea and the Sea of Okhotsk. *Id.* The vessels called on ports in Russia, Japan, Alaska,

Washington and Oregon. *Id.* Crewmembers serving at the time of Hoddevik's employment aboard the OCEAN ENTERPRISE resided in virtually every state in the union, and various foreign countries, including Ireland, Japan, Poland, Viet Nam, Russia, Bulgaria, Samoa, Mexico and others.

Hoddevik left the OCEAN ENTERPRISE July 9, 1992 secondary to a nose injury and claimed frostbite to her feet. She returned to Seattle, Washington, where she obtained medical treatment for her injuries and was provided with appropriate seaman's benefits. Hoddevik subsequently filed suit against Arctic Alaska in the U.S. District Court, Western District of Washington pursuant to the Jones Act (46 U.S.C. § 688) and general maritime law, seeking compensation for these injuries. Hoddevik's complaint in the federal action made no claim of sexual harassment or sexual assault; she even testified at her deposition in the federal case that she had ***not*** been harassed aboard the OCEAN ENTERPRISE.

Hoddevik's personal injury claim was settled with the assistance of a settlement judge in the U.S. District Court for the Western District of Washington in the Fall of 1994. Hoddevik was represented by counsel at the settlement conference, but she nonetheless sought to avoid the settlement, forcing Arctic Alaska to bring an action to enforce the settlement. Only after the federal case was finally resolved did Hoddevik come forward with the allegation that she had been sexually harassed on the OCEAN ENTERPRISE. Hoddevik alleged that she was subjected to crewmembers' use of profanity, sexual epithets, an alleged exposure of genitalia by a member of

the crew, and an alleged assault by a second crewmember. All of these alleged acts occurred while the vessel was at sea.

At no time during Hoddevik's employment on the OCEAN ENTERPRISE was the vessel in Washington State territorial waters; indeed, the OCEAN ENTERPRISE has never fished in Washington waters. Hoddevik was within an individual state's territorial waters only twice: when she boarded the vessel on May 24, 1992, and when she departed on July 9, 1992, both in Dutch Harbor, Alaska. Hoddevik does not allege that any of the claimed acts of harassment occurred within Washington waters; indeed, none of her employment occurred in the territorial jurisdiction of Washington or (aside from getting on and off the boat) any other state.

REASONS FOR GRANTING THE WRIT

The Washington Court of Appeals erroneously decided that the state's interest in applying its laws against sexual harassment to seamen working aboard vessels in navigation beyond the territorial jurisdiction of any state outweighed the admitted burden application of state law would have on the federal interest in uniform maritime law. Court of Appeals' Opinion, App. 15. This important question of federal law has not been, but should be, decided by this Court. Supreme Court Rule 10(c). In failing to find that maritime law properly preempted the application of state laws, the Washington Court of Appeals' decision is in conflict with relevant decisions of this Court. Supreme Court Rule 10(c). That

decision conflicts with this Court's decisions on the subject of admiralty preemption, which require that state law be applied only in the absence of a judicially fashioned admiralty rule or federal statute, or where federal interest in the uniformity of maritime law would not be jeopardized, particularly when the subject matter involves the primary conduct of seamen. *See, e.g., Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624-25 (1978); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 228 (1986) (*citing Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917); *O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 512 U.S. 79 (1994) (uniformity is most important when the rule at issue regulates primary conduct).

While state law should be preempted by the uniform federal maritime law, it is also clear that the law of a single state, particularly a state with only nominal contact with the conduct of which the plaintiff complains, should not displace substantive admiralty law. *See, Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407 (1976) (not strictly a preemption case, but provides an analysis of contacts required before state law could apply; on facts remarkably similar to those in this case, contacts found to be insufficient to allow application of state law).

Hoddevik had an available remedy provided by both a judicially fashioned admiralty rule and a federal statute. Application of state law has a damaging effect on uniformity in maritime law. Additionally, the State of Washington had insufficient contacts with the alleged acts of sexual harassment to justify displacing federal maritime law. Hoddevik's state law claims should have

been preempted. This Court, accordingly, should issue a writ of certiorari to review this important federal issue.

DISCUSSION

I. THE EXISTENCE OF FEDERAL MARITIME LAW WHICH PROVIDES SEAMEN A REMEDY FOR ALLEGED SEXUAL HARASSMENT PREEMPTS STATE LAW.

That maritime law recognizes a cause of action for conduct which may amount to sexual harassment or discrimination under various federal or state statutory schemes has been expressly recognized by the United States Court of Appeals for the Fifth Circuit (*Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260 (5th Cir.1991)). This Court has implicitly recognized such claims by allowing causes of action for purely emotional injuries under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51-60. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). Claims brought pursuant to the Jones Act, 46 U.S.C. App. § 688, which expressly incorporates the provisions of the FELA, would have the same result. Three federal Circuits have recognized claims for purely emotional injuries in cases arising under the FELA/Jones Act. *Marchica v. Long Island RR Co.*, 31 F.3d 1197 (2d Cir.1994), *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir.1993) *rev'd sub nom, Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1409 (9th Cir.1994) (Jones Act), *Buell v. Atchison, Topeka & Santa Fe Rwy.*, 771 F.2d 1320 (9th Cir.1985) (FELA), *aff'd in*

part, vacated in part, 480 U.S. 557 (1987). Finally, a statutory avenue for redress exists under Title VII of the Civil Rights Act of 1964. Accordingly, this Court should issue a writ of certiorari to resolve the important federal question of whether resort to state laws against discrimination when a maritime remedy is available threatens the uniformity and harmony of maritime law, requiring preemption.

A. Admiralty Jurisdiction Is Proper.

Application of admiralty jurisdiction is appropriate where the alleged misconduct giving rise to the suit occurs on a vessel either: (1) on the high seas; or, (2) on navigable waters and has a nexus with traditional maritime activities. *Executive Jet Aviation v. Cleveland,* 409 U.S. 249 (1972). This case falls within admiralty jurisdiction because the conduct complained of by Hoddevik, that she was the victim of sexual harassment while a member of the crew aboard the OCEAN ENTERPRISE, occurred while she was employed on a U.S. vessel, in navigation in the Bering Sea, and while performing traditional maritime activities. This has never been disputed.

With admiralty jurisdiction comes the application of substantive admiralty law. *East River S.S. v. Transamerica Delaval, Inc.,* 476 U.S. 858 (1986); *Executive Jet,* 409 U.S. at 255. Where a body of maritime law covers an issue or area of law, multiple state laws should be preempted to allow maritime jurisprudence to develop according to its unique needs, and save maritime commerce from confusing choice of law analyses governed, apparently, by the port which happens to be nearest when the particular

casualty occurs. *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 418-19, and footnote 12 (1976) (job situs test applied to right to work laws; held, inapplicable to seamen working on the high seas).

B. Maritime Law Provides A Remedy.

Maritime law permits recovery for emotional injury caused by some forms of harassment, including sexual harassment. *Wilson v. Zapata Off-Shore Co., supra*, 939 F.2d at 264-65; *see Yballa v. Sea-Land Services, Inc.*, 919 F.Supp. 1428 (D.Haw. 1995). Recovery, however, for purely emotional injury, is limited to plaintiffs in a "zone of danger," as that test was defined by this Court in *Gottshall, supra*, 512 U.S. at 549-50. Maritime law thus permits recovery for emotional injury caused by unlawful harassment, and it does so by virtue of the Jones Act and a judicially fashioned admiralty rule.

In addition to the developing body of maritime common law regarding sexual harassment at sea, Title VII of the Civil Rights Act of 1964, 28 U.S.C. § 2000e, *et seq.*, may provide an avenue for redress by U.S. seamen for alleged acts of harassment and discrimination at sea. This federal statutory scheme, in conjunction with the policy underlying uniformity in the maritime law, further emphasizes that state law should not apply in a maritime context. Application of a single federal statutory scheme to United States maritime commerce is consistent with the concern for uniformity underlying maritime law; application of different and potentially conflicting statutory schemes of the various states is not.

The policy underlying the mandate of uniformity in maritime law promotes certainty in maritime commerce as to which law governs conduct at sea. Early in our nation's history, it was observed:

> That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.

The Lottowanna, 21 Wall. 558 (1874). This observation formed the foundation of the U.S. Supreme Court's decision in *Southern Pac. Co. v. Jensen, supra,* 244 U.S. at 215, which held that federal authority over maritime matters was analogous to the power of Congress to regulate interstate commerce. *Id.* at 216-17.

To ensure that the Constitutional limits upon the states' power to pass laws which effect maritime commerce are observed, courts are required to conduct a type

of interest-balancing analysis. *Kossick v. United Fruit Co.*, 365 U.S. 731, 741-42 (1961). The interests of protecting maritime commerce from the uncertainty of liability under the legal regimes of the several states is paramount. This is particularly so when that certainty is derived from a single federal scheme. This scheme includes the Jones Act, general maritime law, and presumably Title VII or other federal statutes. In authorizing application of state law, however, the Washington Court of Appeals failed to properly recognize the various federal remedies available to Hoddevik, and dismisses as insignificant any federal interest in preserving the essential uniformity of maritime law. This Court should issue the writ of certiorari to consider whether the Washington Court of Appeals opinion jeopardizes the overriding interest in uniformity in the maritime law.

C. Washington Law Is Inconsistent With Maritime Law.

Washington's Law Against Discrimination, RCW 49.60, *et seq.*, does not limit the right of recovery by a plaintiff for purely emotional injury to those instances where the plaintiff has been in the "zone of danger." A "hostile environment" claim under RCW 49.60.030 can be premised on conduct that would not satisfy maritime law's "zone of danger test." *See, e.g., Kahn v. Salerno*, 90 Wash. App. 110 (1998). But the fact that federal maritime causes of action do not mirror a sexual harassment cause of action under RCW 49.60.030 (or even Title VII) is not sufficient reason to allow the application of state law. The test is whether the subject matter is addressed by federal

statute or a judicially fashioned admiralty rule.[1] Under that test, Hoddevik's state law causes of action are preempted.

Significantly, preempting RCW 49.60, *et seq.*, does not, of itself, deprive seamen of a remedy. Seamen may still pursue remedies afforded by the Jones Act, general maritime law, and may still file charges of discrimination under Title VII, which, indeed, is very similar to RCW 49.60, *et seq.*, in defining a cause of action for sexual harassment. Hoddevik did not have a civil cause of action under Title VII available to her, however, because she did not timely file an administrative charge with the EEOC. But to change substantive maritime law to avoid the result in a single case, as the Washington Court of Appeals did here, is an inappropriate use of judicial authority.

Allowing seamen-plaintiffs to assert claims under state law would create dissension and inconsistency in admiralty practice contrary to the demand for uniformity in maritime law. Admiralty courts have repeatedly held that state legislation which interferes with the proper uniformity and harmony of admiralty practice is properly preempted, even absent prejudice to a characteristic feature of admiralty. *Southern Pacific Co. v. Jensen,* 244 U.S.

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[1] In contrast, the Washington State Court of Appeals ruled that maritime law preempts state law only where the latter "directly conflicts" with the former. App. 12. This test provides excessive latitude for state regulation of maritime commerce and inhibits maritime law from developing in a different, even if not directly conflicting, manner from state law.

205, 216 (1917).[2] The United States Court of Appeals for the First Circuit observed that state regulation of primary conduct (the behavior of ship or sailors at sea) in the maritime context presents a direct risk of conflict between various state regimes to which a given vessel may be subject. *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir.1994) (*citing Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978)). *See also O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 512 U.S. 79 (1994) (uniformity is most important when the rule at issue regulates primary conduct), and *American Dredging Co. v. Miller*, 510 U.S. 443 (1994).

Unquestionably, conduct targeted by state anti-harassment laws, such as Washington's, presents a clear example of a state attempting to regulate primary conduct that, as it relates to the conduct of seamen on the high seas, has been the exclusive domain of federal maritime law. In allowing application of state law, the Washington Court of Appeals' holding far exceeded state authority to regulate maritime conduct. Moreover, the contours of the maritime cause of action are still emerging, but its elements are clearly not co-extensive with those under state anti-discrimination statutes. Accordingly, permitting state statutory actions in this context would retard, rather than promote, further development of the maritime law.

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[2] *See also, Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 675-676, *rehearing denied*, 458 U.S. 899 (1982); *Fuller v. Golden Age Fisheries*, 14 F.3d 1405 (9th Cir.1994) (federal law preempts State of Alaska wage and hour statutes); and *In re Exxon Valdez*, 767 F.Supp. 1509 (D.Alaska 1991) (federal maritime law preempts state law where oil spill gives rise to a maritime tort, *citing Jansson v. Swedish American Line*, 185 F.2d 212, 216 (1st Cir.1950)).

II. FEDERAL MARITIME LAW SHOULD PREEMPT STATE LAW WHEN THE STATE CLAIMING AN INTEREST HAS NOMINAL CONTACTS AND ALLOWING THAT STATE TO APPLY ITS LAW TO ACTS WHICH OCCUR AT SEA INTERFERES WITH THE PROPER UNIFORM WORKING OF THE MARITIME LEGAL SYSTEM.

Application of state law in this case would frustrate the uniformity mandated by federal maritime law and promote confusion in the courts and in maritime commerce as to whose law governs conduct at sea. The decision of the Washington Court of Appeals affects not only Arctic Alaska Fisheries Corporation, but also affects every other maritime employer with any connection to the State of Washington, and encourages other states to apply their laws in comparable ways. Arctic Alaska's vessels touch jurisdictions all over the world. Typical of maritime commerce, its vessels ply the waters throughout the Pacific Basin, fish outside state territorial waters, and call on ports in numerous states and countries. Its crewmembers come from virtually every state in the union and a number of different countries. In point of fact, Dutch Harbor, Alaska, was the nearest the OCEAN ENTERPRISE came to the State of Washington during Hoddevik's entire service aboard the vessel. The vessel has never even fished in the territorial waters of Washington State.

Given the potential applicability of the laws of fifty states and numerous foreign countries, common sense dictates that there be some balance between the rights of individual seamen and exposure to liability by the vessel

owners. That balance is struck by the application of uniform admiralty law, including the Jones Act, the Death on the High Seas Act, numerous international treaties, and general maritime common law. The balance may also be struck by application of federal statutes (*e.g.*, Title VII) which, while not "maritime," would have a uniform application to U.S. shipping. This is the law which should apply to conduct on U.S. vessels with multi-jurisdictional contacts, not the laws of any single state, selected by each separate plaintiff, wherever the plaintiff might be able to obtain jurisdiction over a shipowner defendant.

Arctic Alaska's experience provides a single example of the varied jurisdictional contacts of persons and companies engaged in maritime commerce. Given the wide variety of state and foreign laws potentially applicable to the various aspects of maritime commerce, the need for uniformity is both obvious and paramount. Without adherence to a uniform body of law, admiralty cases risk being reduced to chaotic choice of law analyses between competing jurisdictions. That is why the Founders provided for a separate body of Admiralty law in the Constitution. Preemption of state law claims which threaten that uniformity, upsetting the balance between maritime commerce and the rights of seamen, is an appropriate exercise of judicial authority.

CONCLUSION

Claims of sexual harassment by seamen, arising from acts which transpired at sea, should be governed by uniform law. Where federal law provides a remedy to a

seaman, and a state law interferes with the uniformity required by admiralty law, claims based upon state law are preempted. The existence of federal statutory and maritime common law principles applicable to this case, along with the clear need for uniformity in maritime law, mandate preemption of Hoddevik's state law claims. Failure to make such claims subject to uniform law imposes substantial burdens on maritime employers, impermissibly interfering with maritime commerce. These burdens on commerce raise significant issues of public interest justifying acceptance of review of this important issue.

Respectfully submitted,

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Court of Appeals
for the State of Washington

[No. 41227-2-I. Division One. February 1, 1999.]
DANELLE HODDEVIK, *Respondent*, v. ARCTIC ALASKA FISHERIES CORPORATION, ET AL., *Appellants*.

[As amended by order of the Court of Appeals April 28, 1999.]

BAKER, J. – Arctic Alaska Fisheries Corp. (Arctic) appeals from a judgment entered on a jury verdict finding it liable to a crew member of a fishing vessel under the Jones Act, 46 U.S.C. app. § 688. Danelle Hoddevik cross-appeals the summary judgment dismissal of her RCW 49.60 claim for discrimination. We hold that the trial court improperly instructed the jury as to the elements of a claim under the Jones Act for negligent infliction of emotional distress. We also hold that Hoddevik's discrimination claim should not have been dismissed as preempted by federal maritime law. We thus reverse the jury's verdict under the Jones Act as well as the trial court's summary judgment dismissal of Hoddevik's RCW 49.60 claim.

I

Hoddevik worked as a fish cutter on Arctic's factory trawler, the Ocean Enterprise (Enterprise).[1] She claims that her male co-workers spoke to her, and about her, in a sexually explicit manner, and that she was propositioned

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[1] Arctic concedes that Hoddevik was a member of the ship's crew, or a "seaman" for purposes of maritime law and the Jones Act.

to perform sexual acts. Hoddevik also claims that a non-English speaking Bulgarian immigrant, Doykov, was taught sexually offensive language and told to repeat it to her, and that another Bulgarian, Mankov, spoke better English and facilitated this behavior.

Hoddevik complains of several other improper incidents on the Enterprise. For example, first mate Street pulled off a male crew member's towel when the crew member was walking to his cabin from a shower. Hoddevik saw this incident. Hoddevik alleges that Doykov exposed himself to her in the ship's laundry room. She also alleges that after the laundry room incident, Mankov attempted to rape her in his cabin.

In July 1992, Hoddevik left the Enterprise due to unrelated physical injuries that occurred during her period of employment. She subsequently filed this case, alleging unseaworthiness, maintenance and cure, negligence under the Jones Act, and state law claims, including a claim under RCW 49.60, the Washington Law Against Discrimination (WLAD). Upon Arctic's motion for summary judgment, the trial court dismissed Hoddevik's state law claims as preempted by federal maritime law. Hoddevik appeals dismissal of her RCW 49.60 claim. At trial, the jury did not find Arctic liable for unseaworthiness or maintenance and cure, but did find Arctic liable under the Jones Act. Arctic appeals the Jones Act verdict.

II

Federal judicial power "extend[s] . . . to all Cases of admiralty and maritime Jurisdiction."[2] Federal jurisdiction is exclusive over any in rem maritime cause of action.[3] In fact, federal jurisdiction is exclusive in all civil cases of admiralty and maritime jurisdiction, except for those under a federal statute that allows for "saving to suitors in all cases all other remedies to which they are otherwise entitled."[4] Under this statute, a plaintiff may file an in personam maritime claim in state court where Congress has authorized such suits, or where such suits were known at common law and Congress has not conferred exclusive jurisdiction on the federal courts.[5]

For cases that can be brought in state court under the "saving to suitors" clause, a state court may " 'adopt such remedies, and . . . attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law.' "[6] State courts must follow substantive maritime law in such cases.[7] Moreover, a

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[2] U.S. Const., Art. III, § 2, cl. 1.

[3] *American Dredging Co. v. Miller*, 510 U.S. 443, 446, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994).

[4] 28 U.S.C. § 1333(1).

[5] *See* 1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 4-2, at 134-136 (2d ed.1994).

[6] *Miller*, 510 U.S. at 447, (quoting *Madruga v. Superior Court*, 346 U.S. 556, 561, 74 S.Ct. 298, 301, 98 L.Ed. 290 (1954) (quoting *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124, 44 S.Ct. 274, 277, 68 L.Ed. 582 (1924))).

[7] *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-223, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986); *see also Stanton v. Bayliner Marine Corp.*, 123 Wm.2d 64, 866 P.2d 15 (1993) (substantive

state court may not provide a remedy which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."[8]

The Jones Act provides in relevant part:

> **Recovery for injury to or death of seaman**
>
> (a) Application of railway employee statutes; jurisdiction
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located . . . [9]

The relevant railway employee statutes are collectively known as the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. In personam Jones Act

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maritime law applies when the events giving rise to a lawsuit occur on navigable waters and the activity has the potential to affect maritime commerce).

[8] *Miller*, 510 U.S. at 447, (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524, 529, 61 L.Ed. 1086 (1917)); see also *Stanton*, 123 Wm.2d at 87-89 (federal interest in uniform substantive maritime law preempted conflicting state law).

[9] 46 U.S.C. app. § 688.

claims may be brought in state or federal courts by way of the "saving to suitors" clause.[10]

Jones Act Negligence

The Jones Act provides no cause of action for sexual harassment, but does allow a limited cause of action for damages due to negligent infliction of emotional distress. Under FELA, and thus by extension under the Jones Act, a worker seeking to recover for negligent infliction of emotional distress is limited by the "zone of danger" test first set forth in *Consolidated Rail Corp. v. Gottshall*.[11]

The "zone of danger" test limits recovery for emotional injuries to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct.[12] Only those within the zone of danger of physical impact can recover.[13] Two post-*Gottshall* appellate cases which address negligent infliction of emotional distress under FELA confirm this rule and apply *Gottshall's* requirement for a physical impact or the immediate risk of physical harm due to a defendant's negligence

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[10] *Miller*, 510 U.S. at 443.

[11] *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 548, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994) (railroad employees may recover for emotional damages caused by an employer's negligent conduct that imminently threatens an employee with physical impact, but not for emotional injuries stemming from a stressful working environment)

[12] *Gottshall*, 512 U.S. at 547-48.

[13] *Gottshall*, 512 U.S. at 548 (citations omitted).

under the "zone of danger" test.[14] Thus, under the "zone of danger" test set forth in *Gottshall*, a Jones Act claim such as Hoddevik's must also show a physical impact due to an employer's negligent conduct, or the immediate risk of physical harm caused by that conduct.[15]

Arctic contends that the trial court should have granted it a directed verdict or judgment NOV because the "zone of danger" test is not satisfied in the instant case. In reviewing a motion for a directed verdict or judgment NOV, we apply the same standard as the trial court (i.e., de novo) and reverse only if the evidence is insufficient to support the verdict as a matter of law.[16] The trial record must contain evidence sufficient to persuade a rational, fair-minded person of the truth of the premise in question.[17] Hoddevik claims she was assaulted by Mankov, which would be a physical impact for purposes of the zone of danger test. Hoddevik must come forward with sufficient evidence to persuade a rational, fair-minded person of a physical impact due to Mankov's alleged assault. Under the "zone of danger" analysis, she must also prove that Arctic was negligent. Maritime law causes of action for an employer's negligence where a

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[14] *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 117 S.Ct. 2113, 2117, 138 L.Ed.2d 560 (1997); *Szymanski v. Columbia Transp. Co.*, 154 F.3d 591, 594-95 (6th Cir.1998).

[15] *Gottshall*, 512 U.S. at 547-48.

[16] *Hume v. American Disposal Co.*, 124 Wm.2d 656, 667, 880 P.2d 988 (1994).

[17] *Canron, Inc. v. Federal Ins. Co.*, 82 Wm.App. 480, 486, 918 P.2d 937 (1996), *review denied*, 131 Wm.2d 1002, 932 P.2d 643 (1997).

crew member is assaulted require that an assault is foreseeable and that the ship's officers failed to prevent such an assault.[18] Arctic contends that it is entitled to judgment as a matter of law because the jury rejected these possibilities when it found for Arctic on the unseaworthiness claim.

Jury instruction number nineteen states:

> A vessel may be unseaworthy if it has in its crew a crewmember who assaults another crewmember. However, not every assault is proof of unseaworthiness. For example, a fistfight between two crewmembers does not necessarily create or indicate an unseaworthy condition. Only assaults committed by a crewmember whose conduct is significantly below the usual and customary standards of the calling of men and women who work at sea will indicate an unseaworthy condition of the vessel. . . .

Jury instruction number twenty states:

> In determining whether the Ocean Enterprise was unseaworthy as defined in these instructions, you must not concern yourself with the question of defendant's knowledge of the factors that rendered the vessel unseaworthy. If you find that the vessel was rendered unseaworthy by crew conduct, it does not matter if the defendant did not know about such conduct, or if it did not know that certain crewmembers were of such dispositions that were likely to cause them to engage in such conduct. It also

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[18] *See Miles v. Melrose*, 882 F.2d 976, 983-84 (5th Cir.1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).

> does not matter how many times such conduct occurred, if you determine that the conduct constituted an unseaworthy condition.

The above instructions do not require that the assault was foreseeable or that ship's officers failed to prevent the assault, but an "assault committed by a crewmember whose conduct is significantly below the usual and customary standards of the calling of men and women who work at sea."

We think it very unlikely that a jury could find that an assault might be conduct which meets "the usual and customary standards of the calling of men and women who work at sea" and was foreseeable, but nonetheless preventable by ship's officers. But we need not determine as a matter of law whether the jury verdict on these unseaworthiness instructions disposes of Hoddevik's Jones Act claim because we are persuaded by Arctic's alternative argument that a reversal is required.

Arctic contends in the alternative that it is entitled to a new trial because the jury was improperly instructed on Hoddevik's Jones Act claim. Civil jury instructions are reviewed de novo on appeal.[19] Appealed jury instructions are reviewed to determine whether they permit the parties to argue their theories of the case, whether they are misleading, and whether they accurately inform the jury of the applicable law.[20] An instruction which erroneously states the applicable law constitutes reversible error if a

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[19] *Hue v. Farmboy Spray Co., Inc.*, 127 Wash.2d 67, 92, 896 P.2d 682 (1995).

[20] *Adcox v. Children's Orthopedic Hosp.*, 123 Wash.2d 15, 36, 864 P.2d 921 (1993) (citing *Douglas v. Freeman*, 117 Wash.2d 242, 256-57, 814 P.2d 1160 (1991)).

party is prejudiced.[21] An error is prejudicial where the outcome at trial is affected.[22]

Here, jury instruction number twelve reads:

> Plaintiff alleges that she was sexually harassed, abused, and assaulted aboard the Ocean Enterprise, and that defendant was negligent in permitting plaintiff to be sexually harassed, abused, and assaulted aboard the Ocean Enterprise.
>
> If you find that defendant was negligent in any way in allowing sexual harassment of plaintiff to occur, and if you find that the harassment played any part, no matter how slight, in causing plaintiff's injuries, you must find defendant liable for her damages.
>
> In order to find defendant liable based on sexual harassment, you must find that the conduct affecting plaintiff created a threat beyond sex discrimination. This limitation does not apply to your consideration of liability for sexual abuse or assault.

This jury instruction is problematic. It allows a finding of liability if the defendant was negligent "in any way" for allowing Hoddevik to be sexually harassed. It does not properly inform the jury of the law under *Gottshall*. It indicates that a finding based on sexual harassment must show a threat beyond sex discrimination but fails to provide guidance on the legal relationship between those two terms or what might constitute such a threat. The jury was left to speculate as to the state of the

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[21] *Hue*, 127 Wash.2d at 92, 896 P.2d 682.

[22] *Stiley v. Block*, 130 Wash.2d 486, 499, 925 P.2d 194 (1996), reconsideration denied (1997).

law. Under these jury instructions we cannot say that Arctic would have been found liable if the jury had been asked to apply the correct legal standard. We reverse the jury's verdict.

Federal Maritime Law Preemption of RCW 49.60

Hoddevik's discrimination claim was dismissed upon Arctic's motion for summary judgment on the basis that such claims are preempted under federal maritime law. On appeal, we address federal maritime preemption of Hoddevik's claim under RCW 49.60 as a question of law and review the trial court's determination de novo.[23]

RCW 49.60.030 provides in relevant part:

> **Freedom from discrimination – Declaration of civil rights**
>
> (1) The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> (a) The right to obtain and hold employment without discrimination
>
> . . .
>
> (2) Any person deeming himself or herself injured by any act in violation of this chapter

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[23] *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998) (citing *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994)).

> shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter . . .

State legislation may be preempted by federal law in more than one way. First, Congress may preempt state law by stating so in express terms.[24] Second, Congress may preempt state law where a scheme of federal regulation is sufficiently comprehensive to allow a reasonable inference that Congress "left no room" for supplementary state regulation.[25] Third, where Congress has "left room" for supplementary state regulation, federal law may preempt state law to the extent it actually conflicts with federal law.[26] Such a conflict exists where compliance with both state and federal law is impossible, or where state law presents an obstacle to the accomplishment and execution of federal purposes and objectives.[27]

Congress has not expressly preempted state human rights statutes such as RCW 49.60. Congress has "left room" for supplementary state regulation in the area of human rights, and there are many states where statutory anti-discrimination laws coexist with federal anti-

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[24] *California Federal Sav. and Loan Ass'n. v. Guerra*, 479 U.S. 272, 280, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987).

[25] *Guerra*, 479 U.S. at 280-281.

[26] *Guerra*, 479 U.S. at 281.

[27] *Guerra*, 479 U.S. at 281.

discrimination laws, and where state schemes often compliment the federal scheme.[28] The inquiry thus focuses on whether Washington law presents an actual conflict with maritime law.

Under such an inquiry, state legislation may be preempted if it directly conflicts with substantive maritime law or interferes with its "proper harmony and uniformity."[29] As discussed above, recovery for negligent infliction of emotional distress under the Jones Act is problematic under facts such as those in the instant case (e.g. restrictive "zone of danger" test) and does not provide a "right to obtain and hold employment without discrimination."[30] We find no direct conflict between the limited cause of action provided by the Jones Act (i.e., requiring a physical impact) and RCW 49.60.

Even without a direct conflict, state legislation may be preempted if it interferes with the "proper harmony and uniformity" of substantive maritime law.[31] Such a determination requires a balancing of state and federal interests.[32] In reaching our determination in the instant case, we have considered the reasoning of our Supreme

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[28] *See* Developments – Employment Discrimination, 109 Harv. L.Rev. 1568, 1575-1577 (1996).

[29] *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 628 (1st Cir.1994) (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524, 61 L.Ed. 1086 (1917)).

[30] RCW 49.60.030(1)(a).

[31] *Ballard Shipping*, 32 F.3d at 628.

[32] *Ballard Shipping*, 32 F.3d at 628 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 738-742, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961)).

Court in *Stanton*, 123 Wash.2d at 87-88, 866 P.2d 15 (substantive maritime law precluded application of state product liability act for economic loss of yachts).

At issue in *Stanton* was the definition of "economic loss" under state law. The United States Supreme Court had fashioned a judicial remedy under admiralty law which precluded recovery for pure economic loss.[33] The Court of Appeals held that Washington's definition of economic loss should apply, stating "[w]hatever federal interest in uniformity exists, it is outweighed by Washington's concern to ensure the personal safety of its citizens, to deter the manufacture and dissemination of dangerous products, and to exercise its authority over tortfeasors acting within its jurisdiction."[34] Our Supreme Court held that "the state interests articulated by the Court of Appeals do not obviate the need for uniformity in maritime products liability law."[35] The *Stanton* court stated that even if there was no actual conflict between state and federal remedies, Washington's interest in providing a remedy to the *Stanton* plaintiffs did not outweigh the federal interests in maritime uniformity.[36] The Supreme Court was highly deferential to the need for uniform maritime law, engaged in extensive analysis of

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[33] *Stanton v. Bayliner Marine Corp.*, 123 Wash.2d 64, 83-84, 866 P.2d 15 (1993).

[34] *Stanton v. Bayliner Marine Corp.*, 68 Wash.App. 125, 132, 844 P.2d 1019 (1992).

[35] *Stanton*, 123 Wash.2d at 84, 866 P.2d 15.

[36] *Stanton*, 123 Wash.2d at 84, 866 P.2d 15.

law from other jurisdictions, and held that state product liability law was preempted.[37]

Unlike *Stanton*, there is no judicially fashioned admiralty rule on point here.[38] The case at bar involves sexual harassment claims under the Washington Law Against Discrimination, not the Washington Product Liability Act. The policies, considerations, and goals of these two enactments are not equivalent. *Stanton* is thus distinguishable.

In reaching our determination in the instant case, we have also considered the reasoning of the federal district court in *Morgan v. Tyson Seafood Group Inc.*,[39] a recent case involving disability discrimination and the Jones Act. *Morgan* balanced federal interests against Washington's employment discrimination laws, and held that the proper harmony and uniformity of substantive maritime law does not preempt RCW 49.60.[40] We agree with the analysis in *Morgan*, and find that the reasoning of that case can also be extended to include sexual discrimination claims under RCW 49.60.

In the instant case, as in *Morgan*, the State of Washington has a great interest in applying its anti-discrimination laws to Arctic. Arctic is a corporation organized

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[37] *Stanton*, 123 Wash.2d at 85-89, 866 P.2d 15.

[38] *Stanton*, 123 Wash.2d at 87, 866 P.2d 15.

[39] 1998 A.M.C. 1185, 1997 WL 882599 (W.D.Wash.1997) (plaintiff in rehabilitative therapy due to a work related injury brought claims under the Jones Act for physical injury, claims under general maritime law, and a discrimination claim under RCW 49.60 after being told by the defendant that he no longer had a job and would not be re-hired).

[40] *Morgan*, 1998 A.M.C. 1185.

under the laws of the State of Washington, and hired Hoddevik in Seattle. Arctic should be subject to liability if it engaged in behavior impermissible under RCW 49.60. Washington has a strong interest in protecting its citizens, like Hoddevik, from injury.[41] It is true that the federal interest in uniform maritime law may be burdened by application of Washington's anti-discrimination scheme. But there are many states where maritime enterprises are already subject to state anti-discrimination laws which coexist with similar federal laws.[42] The trial court improperly held that federal maritime law preempted Hoddevik's RCW 49.60 claim.

We reverse summary judgment on Hoddevik's RCW 49.60 claim because it is not preempted by federal maritime law. We also reverse the jury's verdict on Hoddevik's Jones Act claim because the jury instructions should have set forth the correct legal standard under the "zone of danger" test for Jones Act liability. Failure to properly instruct the jury of the law under the Jones Act was reversible error.

Reversed

WEBSTER and ELLINGTON, JJ., concur.

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[41] *Ballard Shipping*, 32 F.3d at 629.

[42] *See* Developments – Employment Discrimination, 109 Harv. L.Rev. at 1575-1577.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DANELLE HODDEVIK, Respondent. vs. ARCTIC ALASKA FISHERIES CORPORATION, et al., Appellant.	NO. 41227-2-I DIVISION ONE ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION (Filed Mar. 3, 1999)

Respondent, Danelle Hoddevik, having filed a motion for reconsideration of the opinion filed and a majority of the panel having determined that said motion should be denied; now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration be, and the same hereby is denied.

DATED this 3rd day of March, 1999.

/s/ Baker, J
Presiding Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

DANELLE HODDEVIK, Respondent, v. ARCTIC ALASKA FISHERIES CORPORATION, et al., Appellant.	)	No. 41227-2-I MANDATE KING County Superior Court No. 95-2-12986-2.SEA

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for KING County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on February 1, 1999, became the decision terminating review of this court in the above entitled case on September 16, 1999. An order denying a motion for reconsideration was entered on March 3, 1999. An order granting Petitioner Hoddevik's motion to strike reply of Arctic Alaska and denying a petition for review was filed in the Supreme Court on September 1, 1999. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

c: Mary Mann
Gail Pyle
Jeffrey Cowan
Amanda Owen
David Bratz
Hon. Glenna Hall

(SEAL) **IN TESTIMONY WHEREOF,** I have hereunto set my hand and affixed the seal of said Court at Seattle, this 16th of September, 1999.

/s/ Richard D. Johnson

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals, State of Washington, Division I.

[Opinion is reprinted at App. 1 to App. 15.]

HONORABLE GLENNA HALL

IN THE SUPERIOR COURT OF
WASHINGTON FOR KING COUNTY

DANELLE HODDEVIK, Plaintiff, v. F/V OCEAN ENTERPRISE, Engines, Tackle, Equipment, and Appurtenances, *In Rem*, OCEAN FISHERIES, INC., ARCTIC FISHERIES, INC., ARCTIC ALASKA FISHERIES, CORP., a Washington Corporation, Its Owner *In Personam*, Defendants.	NO. 95-2-12986-2SEA ~~[PROPOSED]~~ ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING STATE LAW CLAIMS (Filed Jan. 3, 1997)

This matter has come on before the above-entitled court on motion of defendants for partial summary judgment to dismiss the plaintiff's state law claims. The court has reviewed the files and the records herein, including the following specific items:

1. Defendants' Motion for Partial Summary Judgment to Dismiss State Law Claims and Memorandum in Support Thereof;

2. Declaration of Paul McGreenery;

3. Declaration of David C. Bratz (attaching plaintiff's complaint);

4. Plaintiff's Brief in Opposition to Motion for Partial Summary Judgment;
5. Declaration of Plaintiff (December 9, 1996);
6. Declaration of Mary Ruth Mann (December 9, 1996);
7. Defendant's Reply Brief; and
8. Supplemental Declaration of David C. Bratz.

The Court has heard argument of counsel and deems itself fully advised in the premises. Now, therefore,

IT IS HEREBY ORDERED that defendants' Motion for Partial Summary Judgment to Dismiss State Law Claims shall be granted. The Court finds no genuine issue of material fact and concludes as a matter of law that plaintiff's state law claims, both statutory and common law, should be and hereby are dismissed with prejudice.

DONE IN OPEN COURT this 3d day of January, 1997.

/s/ Glenna S. Hall
HONORABLE GLENNA HALL
KING COUNTY SUPERIOR
COURT JUDGE

Presented by:

LE GROS, BUCHANAN & PAUL

By /s/ David C. Bratz
DAVID C. BRATZ
WSBA# 15235
Of Attorneys for Defendants

Copy Received:

~~Approved as to Form;~~
~~Notice of Presentation Waived:~~

MANN & PECK, P.S.

By /s/ Jeffrey Cowan
JEFFREY COWAN
WSBA# 19705
~~MARY RUTH MANN WSBA#~~
Of Attorneys for Plaintiff

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION ONE

DANELLE HODDEVIK, Petitioner, v. F/N OCEAN ENTERPRISE, Official No. 678236, Its Engines, Tackle, Equipment and Appurtenances, *In rem* OCEAN FISHERIES, INC., ARCTIC ALASKA FISHERIES CORP., a Washington corporation, Its Owner In Personam, Petitioner.	No. 40155-6-1 COMMISSIONER'S RULING DENYING DISCRETIONARY REVIEW (Filed April 2, 1997)

The Superior court judge found that Danelle Hoddevik's state law claim for sexual harassment is preempted by admiralty law and therefore granted summary judgment dismissal of the claim. For the reasons set forth below, the court did not commit obvious or probable error in finding preemption. Accordingly, Hoddevik's motion for discretionary review is denied.

FACTS

During the summer of 1992, Danelle Hoddevik worked as a processor and steward aboard the Ocean Enterprise, a factory trawler fishing vessel. Hoddevik

filed this action again Ocean Enterprises, alleging that she was subject to a hostile work environment on account of her sex. She seeks damages under Washington's law against discrimination, RCW 49.60, the Jones act, and general maritime law.

Ocean Enterprise moved to dismiss Hoddevik's state law claim, arguing it is preempted by federal admiralty law. The superior court agreed and granted summary judgment dismissal in favor of Ocean Enterprise. Hoddevik seeks discretionary review of the ruling.

CRITERIA

This court will grant interlocutory review of a superior court order only:

> (1) If the superior court has committed an obvious error which would render further proceedings useless; or
>
> (2) If the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; or
>
> (3) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court.

RAP 2.3(b).

DECISION

It is undisputed that the Ocean Enterprise was off the coast of Alaska in the Bering Sea during the entire time of Hoddevik's employment. Accordingly, it is not disputed that admiralty law applies.[1] If admiralty jurisdiction applies, the state court must determine whether substantive admiralty law precludes applying a state law remedy.[2] A state law is preempted if it conflicts with, rather than supplements, admiralty law. The principle is illustrated in *Stanton*.

In that case, the plaintiffs sought to recover the costs of replacing damaged yachts. Although the action arose in admiralty jurisdiction, the plaintiffs sought damages under the Washington Consumer Protection Act. However, admiralty law does not recognize a products liability claim if the only injury is economic loss (the *East River* rule). In *Washington Water Power Co. v. Graybar Elec. Co.*,[3] a non-admiralty case, the State Supreme Court concluded that *East River's* definition of "economic loss" failed to implement the state legislative goals under the Washington Products Liability Act. Accordingly, the *Graybar* Court crafted a definition of "economic loss" that differed from the *East River* definition. In light of the

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[1] *See Stanton v. Bayliner Marine Corp.*, 123 Wn.2d 64, 866 P.2d 15 (1993) (admiralty law applies when the events giving rise to the lawsuit occur on navigable waters and the activity has the potential to affect maritime commerce).

[2] *Stanton*, 123 Wn.2d at 73-74.

[3] *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 774 P.2d 1199, 779 P.2d 697 (1989).

differing definitions, the *Stanley* Court concluded that admiralty law preempted state law.

Returning to this case, Hoddevik argues that an action under Washington's discrimination statute does not conflict with admiralty law. She relies upon *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260 (5th Cir. 1991).

In that case, Wilson claimed that she was the victim of sex discrimination and harassment. She filed suit against Zapata Off-Shore, alleging a Title VII claim for sex discrimination and Jones Act and general maritime law claims for emotional distress. Zapata noted a recent case in which the Sixth Circuit held that a worker's claim of sexual harassment is not cognizable under FELA (federal employers' liability act). Because the Jones Act incorporates the FELA, Zapata argued that Wilson's claim of sexual harassment was likewise barred.

The court recognized that the Jones Act does not cover conduct that is wrongful only under Title VII. But Wilson's evidence showed "harassment, both physical and otherwise, resulting in physical and emotional injury."[4] The evidence also established that Wilson was subjected to unwanted physical contact, "contact which in some instances amounted to a common-law battery."[5] The court held that "[s]uch conduct could be found wrongful even if Title VII had never been enacted and without regard to concepts of sex discrimination."[6]

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[4] *Wilson v. Zapata*, 939 F.2d at 265.

[5] *Wilson*, at 265.

[6] *Wilson*, at 265.

Accordingly, the court found that Wilson's claims of "tortious physical contact and significant physical injury" were cognizable under the Jones Act.[7] The court expressly refused to decide whether a "purely emotional injury" would be cognizable.[8]

While the *Wilson* Court allowed the sexual harassment claim to go forward, the decision does not support Hoddevik's position. Instead, the decision plainly suggests that a Jones Act claim for sexual harassment cannot proceed absent evidence of battery. Because such evidence is not required under a state law claim of sex discrimination and work place sexual harassment, it appears that state law provides greater relief than that afforded in admiralty. Accordingly, state law conflicts with admiralty as "conflict" is defined in *Stanton*. To the extent that admiralty law may allow a sexual harassment action to go forward without pleading and proof of battery, the law is still evolving and not yet determined.

Given these circumstances, it cannot be said that the superior court judge committed either obvious or probable error by dismissing Hoddevik's state law claim. Rather, under *Stanton*, one may reasonably conclude that the essential elements differ to the point of conflict.

For these reasons, Hoddevik fails to carry her heavy burden of establishing the need for interlocutory review. Moreover, in the event the case ultimately reaches this

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[7] *Wilson*, at 265-66.

[8] *Wilson*, at 266 n.8.

court, appellate review will be benefited by further development of the facts regarding the precise nature of the alleged harassment and discrimination.

Now, therefore, it is hereby

ORDERED that petitioner's motion for discretionary review is denied.

Done this 2nd day of April, 1997.

/s/ Paris K. Kallas
Court Commissioner

THE SUPREME COURT OF WASHINGTON

DANELLE HODDEVIK,
Petitioner,
v.
ARCTIC ALASKA FISHERIES CORPORATION, et al.,
Respondents/ Cross-Petitioners.

NO. 67936-3

ORDER

C/A NO. 41227-2-1

(Filed Sept. 1, 1999)

Department II of the Court considered this matter at its August 31, 1999, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner Hoddevik's Motion to Strike Reply of Arctic Alaska is granted and the Petitions for Review are denied.

DATED at Olympia, Washington this 1st day of September, 1999.

/s/ Richard P. Guy
CHIEF JUSTICE

U.S. Const. art. III, § 2

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[7]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

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[7] This section has been affected by the Eleventh Amendment.

46 U.S.C. § 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

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42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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§ 2000e-5. Enforcement provisions

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management

committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of

this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

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(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged

unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

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RCW 49.60.010. Purpose of chapter.

This chapter shall be known as the "law against discrimination". It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, sex, marital status, age, or the presence of any

sensory, mental, or physical handicap; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

49.60.030. Freedom from discrimination – Declaration of civil rights.

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical handicap is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

* * *

(2) Any person deeming himself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, to recover the actual damages sustained by him, or both, together with the cost of suit including a reasonable attorney's fees or any other remedy authorized by this chapter or the United States Civil Rights Act of 1964;[1] and

(3) Notwithstanding any other provisions of this chapter, any act prohibited by this chapter related to sex discrimination or discriminatory boycotts or blacklists which is committed in the course of trade or commerce in

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[1] 42 U.S.C.A. §§ 2000a et seq.

the state of Washington as defined in the Consumer Protection Act, chapter 19.86 RCW, shall be deemed an unfair practice within the meaning of RCW 19.86.020 and 19.86.030 and subject to all the provisions of chapter 19.86 RCW as now or hereafter amended.

49.60.180. Unfair practices of employer defined.

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, unless based upon a bona fide occupational qualification: *Provided*, That the prohibition against discrimination because of such handicap shall not apply if the particular disability prevents the proper performance of the particular worker involved.

(2) To discharge or bar any person from employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap: *Provided*, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or

to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: *Provided,* Nothing contained herein shall prohibit advertising in a foreign language.

IN THE SUPERIOR COURT OF
WASHINGTON FOR KING COUNTY

DANELLE HODDEVIK, Plaintiff, v. F/V OCEAN ENTERPRISE, Official No. 678236, Its Engines, Tackle, Equipment, and Appurtenances, *In Rem*, OCEAN FISHERIES, INC., ARCTIC FISHERIES, INC., ARCTIC ALASKA FISHERIES, CORP., a Washington Corporation, Its Owner In Personam, Defendants.	NO. 95-2-12986-2SEA DECLARATION OF PAUL McGREENERY

Paul McGreenery declares as follows:

1. I am a Claims Specialist in the Insurance and Claims Department at Tyson Seafood Group, Inc. I make this declaration on personal knowledge and am competent to testify regarding the facts herein stated.

2. Tyson Seafood Group ("Tyson") is the owner and operator of the OCEAN ENTERPRISE. Although it has since been converted to a catcher vessel, in 1992 when plaintiff was aboard the OCEAN ENTERPRISE was a factory trawler, *i.e.*, it caught fish and processed them at sea in a self-contained factory. The OCEAN ENTERPRISE has fished primarily in the Bering Sea and The Gulf of

Alaska, in U.S. waters outside the territorial jurisdiction of any state. When plaintiff was aboard, the vessel fished in U.S. waters in the Bering Sea. The vessel was in port only twice during plaintiff's service aboard her, both times in Dutch Harbor, Alaska, the first time when plaintiff boarded the vessel in late May 1992 and the second time in early July when the vessel returned to port to offload its processed product and plaintiff disembarked. The OCEAN ENTERPRISE was never in Washington waters when plaintiff was aboard, and has never fished in territorial waters of Washington State.

3. Tyson Seafood Group owns and operates over 30 vessels. These vessels consist of several different types of fishing and fish processing vessels, such as factory trawlers, longliners, a pure factory vessel, catcher vessels, crab vessels and freighters. The vessels fish in waters throughout the Pacific Basin including the Bering Sea, the Gulf of Alaska, off the west coast of the United States, and in Russian waters in the western Bering Sea and the Sea of Okhotsk. The vessels have called on ports in Russia, Japan, Alaska, Washington and Oregon. Crewmembers on Tyson vessels come from residences in virtually every state in the union, and from various foreign countries including Ireland, Japan, Poland, Viet Nam, Russia, Bulgaria, Samoa, Mexico and others.

I hereby declare under penalty of perjury of the laws of the State of Washington and the United States of America that the foregoing is true and correct.

DATED and signed this 23rd day of October, 1996.

/s/ Paul McGreenery
PAUL McGREENERY